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Inequity and Bad Conscience: The Effect of Federal Rule of Civil Procedure Twelve on Persons Needed for Just Adjudication

Rule 12 of the Federal Rules of Civil Procedure contains three references to Rule 19 of the same Rules. Because of an oversight in the 1966 amendment of the Rules, one of those references is slightly, but critically, different from the others. Rules 12(b)(7) and 12(g) refer to "a party under Rule 19," but Rule 12(h)(2) refers to "a party indispensable under Rule 19."[1] This difference allows courts to ignore the dictates of "equity and good conscience"[2] and may thereby subject parties to contrary rulings from different courts, prejudice the interests of absent persons, and waste judicial resources.

Consider two victims of reckless drivers; each was injured in exactly the same way and each brought an identical suit in the same court. They filed diversity suits in federal court against the drivers, who were from another state. After the answers were filed, each defendant filed a motion to dismiss for failure to join an "indispensable" party.[3] The cases are identical in every aspect but one: the owner of the car in one case is a citizen of this state, in the other case he is a citizen of another state.

In the first case, the court finds that the interests of the unjoined owner are so important that it would be at odds with "equity and good conscience" to allow the suit to proceed without him.[4] Since joinder of the owner would destroy diversity, the court dismisses the action. In the second case, the court rules that, because the defendant filed the motion after the answer, the absent driver's interests cannot be considered, and the court continues to hear the case.[5]

In some courts, this is exactly the situation that exists.[6] Despite the fact that the absent persons' interests are identical, the court will consider them in one case and ignore them in the other. This creates inequity by treating like parties differently. It also wastes judicial resources because the ignored party is likely to institute a new round of proceedings in order to protect his interests.

This Note explores the creation of this anomalous situation and suggests ways to eliminate it. Part I discusses Rule 19 and the policies underlying it. Part II examines Rule 12 and its references to Rule 19 parties. Part III analyzes the judicial interpretation of Rule 12. Part IV considers whether there is any reason to differentiate between absent persons the way some courts find Rule 12 does, concluding that inter-

1 For further discussion of this difference, see *infra* text accompanying notes 53-67.

2 FED. R. CIV. P. 19(b).

3 This state has a law that specifies that the driver of a car is the agent of the owner. The defendant contends that, since any finding of liability of the agent will be necessarily imputed to the principal, the owner of the car must be joined in the action.

4 *See* FED. R. CIV. P. 19(b).

5 *See infra* notes 120-21 and accompanying text.

6 *See infra* text accompanying notes 94-99.

pretating the Rule in such a way as to distinguish between these parties frustrates the goals of Rule 19. Finally, Part V suggests several ways to eliminate the inequitable treatment of these parties.

I. Compulsory Joinder: The Policies Underlying Rule 19

This section provides a brief history of compulsory joinder and an analysis of the Federal Rules that deal with it. Some familiarity with compulsory joinder is necessary to appreciate the problem created by Rule 12's inconsistent references to Rule 19.

A. *Compulsory Joinder Before the Federal Rules of Civil Procedure*

During the seventeenth and eighteenth centuries, the English Chancery courts developed a pragmatic and reasonably workable doctrine of compulsory joinder.[7] The English rule held that all parties who had an interest in the action should be joined unless it was impossible or extremely impractical.[8] Further, the courts established that a person who was not a party to the action was not bound by the decree.[9]

In the late 1700's, the concept of an "indispensable" party was developed. The indispensable party was one without which the court could not proceed.[10] The doctrine became less pragmatic and more rigid over time, until questions of joinder were determined solely by whether unjoined parties were classified as indispensable.[11]

American courts adopted the indispensable party concept, albeit in a less rigid form. The most influential American decision was the Supreme Court's 1854 holding in *Shields v. Barrow*.[12] In reversing the lower court,

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7 For a more extensive discussion of compulsory joinder in the early English courts, see Hazard, *Indispensable Party: The Historical Origin of a Procedural Phantom*, 61 COLUM. L. REV. 1254 (1961). Professor Hazard points out that early works such as Browne's *Praxis Almae Curiae Cancellariae* (1st ed. 1694/95) and Bohun's *Cursus Cancillariae* (2d ed. 1723) included rules on the joinder of parties. Hazard, *supra*, at 1262, 1263. By 1730, an English treatise could state:

> [G]reat care is to be taken that there be proper *Parties* named in the Bill; and if those whose Right is concerned, are not made Parties, the Defendant may demur to such Bill; or if he doth not, the court will not Proceed to a Decree; or if a Decree be made thereon, it may be reversed.

Id. at 1263 (quoting Jacob, THE COMPLEAT CHANCERY-PRACTISER 139-40 (1730)).

8 Hazard, *supra* note 7, at 1255.

9 *Id.*

10 *See* Fell v. Brown, 2 Bro. C.C. 276, 29 Eng. Rep. 151 (Ch. 1787), where the court considered a suit by a second mortgagee against the first mortgagee in possession seeking an accounting of rents and profits. The mortgagor had died and his heir was in America. The defendant argued the heir should be joined, lest the defendant find himself subject to double liability. The court said: "It seems impossible to me [to proceed] . . . without making the mortgagor or his heir a party." 29 Eng. Rep. at 153.

11 Thus, in 1829, a Chancery court wrote "[t]he rule may be inconvenient or absurd, and may require the interference of the Legislature; but the settled doctrines of the Court are not to be overturned on a mere allegation that the rule may be inconvenient." Farmer v. Curtis, 2 Sim. 466, 467, 57 Eng. Rep. 862, 863 (Ch. 1829).

12 58 U.S. (17 How.) 130 (1854). As one commentator wrote:

> [The decision's] brief catalog of parties in equity actions has been generally accepted in subsequent federal cases and is based on principles applicable to state courts as well. Also, the compulsory joinder provisions of the Federal Rules of Civil Procedure, applicable to law and equity alike, stem more or less directly from the *Shields v. Barrow* formulation.

Reed, *Compulsory Joinder of Parties in Civil Actions*, 55 MICH. L. REV. 327, 340 (1957).

The case involved Shields, a Louisiana citizen, who purchased a plantation from Barrow for $227,000. 58 U.S. (17 How.) at 138. The amount was secured by a note endorsed by six individuals,

the Supreme Court explained that there were three classes of parties to a bill in equity. They were: 1) formal parties; 2) necessary parties, who have an interest in the action and should be joined if feasible; and 3) indispensable parties, whose interest is so intertwined with the controversy that it would be inequitable for the court to proceed without them.[13]

Thus, the Court in *Barrow* drew a dividing line between "necessary" and "indispensable" parties.[14] Necessary parties would be joined if practical, but a court could proceed without them. A decree made in the absence of an *indispensable* party, however, would be "wholly inconsistent

four from Louisiana and two from Mississippi. *Id.* at 130. When Shields defaulted on the note, Barrow obtained a judgment against Shields and one of the endorsers. A compromise settlement was negotiated. *Id.* at 138.

Barrow brought an action to set aside the settlement, claiming it had been obtained improperly. *Id.* He filed suit against the Mississippi endorsers in the federal Circuit Court for the Eastern District of Louisiana. Because the court's jurisdiction was based on diversity, he could not join the Louisiana parties without ousting the court of jurisdiction. (As the reader is probably aware, federal diversity actions require that *all* defendants be from a state other than that of *any* of the plaintiffs. Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806). Federal diversity requirements are codified in 28 U.S.C. § 1332 (1982).) The Court found that the Louisiana endorsers were indispensable to the action, and reversed the Circuit Court's decision allowing Barrow to maintain his suit in their absence. *Id.* at 142, 146.

13 The Court described

> three classes of parties to a bill in equity: They are: 1. Formal Parties. 2. Persons having an interest in the controversy, and who ought to be made parties, in order that the court may act on that rule which requires it to decide on, and finally determine the entire controversy, and do complete justice, by adjusting all the rights involved in it. These persons are commonly termed necessary parties; but if their interests are separable from those of the parties before the court, so that the court can proceed to a decree, and do complete and final justice, without affecting other persons not before the court, the latter are not indispensable parties. 3. Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience.

58 U.S. (17 How.) at 139.

14 I hesitate to use the terms "necessary party" and "indispensable party" because I believe they contribute to the confusion surrounding the issue of compulsory joinder. Necessity and indispensability are not appropriately used in reference to parties. In actuality, the concepts apply to the situation in which the court finds itself, not any trait or aspect of the party.

The Federal Rules advisory committee has recognized this fact. The terms "necessary party" and "indispensable party" do not appear in the amended Rule 19. See *infra* note 19 for the text of Rule 19. The committee deleted the word "necessary" and attempted to remove the word "indispensable" from the Rule as well. *See infra* notes 29-30 and accompanying text. When the word "indispensable" was used, the committee emphasized the correct focus by using the word in a context that made it clear that it referred to the court's determination of what should be done in the situation, rather than an inherent trait of the party. The Rule refers to the court's analysis of the situation, saying that if the court decides to dismiss the action after considering the factors listed in Rule 19(b), the person is "thus *regarded as indispensable*." FED. R. CIV. P. 19(b) (emphasis added). In the note to Rule 19, the committee further emphasized that this term refers to the court's determination:

> The subdivision uses the word "indispensable" only in a conclusory sense, that is, a person is "regarded as indispensable" when he cannot be made a party and, upon consideration of the factors above mentioned, it is determined that in his absence it would be preferable to dismiss the action, rather than to retain it.

FED. R. CIV. P. 19 advisory committee's note (1966).

The confusion occurs when the phrase "the court finds itself in a situation in which it is necessary to join the party, X" is shortened to "the court finds the party, X, necessary," which is then further condensed to "X is a necessary party." While this phrasing is more succinct, it seems to indicate that necessity is a quality of the party, rather than the court's circumstance. This "direct[s] attention to the technical or abstract character of the rights or obligations of the person whose join-

with equity and good conscience"[15] and was prohibited. This formulation became the basis for American doctrine on compulsory joinder of parties.[16]

B. *Compulsory Joinder under Rule 19 of the Federal Rules of Civil Procedure*

1. The Development of Rule 19

The compulsory joinder rules of *Shields v. Barrow*[17] were incorporated into Rule 19 of the Federal Rules of Civil Procedure in 1938.[18] The Rule remained unchanged until 1966, when it was extensively amended.[19] While the courts generally understood the propositions

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der [is] in question, and correspondingly distract[s] attention from the pragmatic considerations which should be controlling." FED. R. CIV. P. 19 advisory committee's note (1966).

On the other hand, the full explication of the situational nature of the concepts of necessity and indispensability is somewhat unwieldy for use in an extended discussion of compulsory joinder, and the terms "necessary party" and "indispensable party" are the usual method of expression. For the sake of readability, the shortened expressions are used in this Note.

15 58 U.S. (17 How.) at 139.

16 *See* Reed, *supra* note 12.

17 58 U.S. (17 How.) 130 (1854).

18 The original version of Rule 19 read:

NECESSARY JOINDER OF PARTIES

(a) Necessary Joinder. Subject to the provisions of Rule 23 and of subdivision (b) of this rule, persons having a joint interest shall be made parties and be joined on the same side as plaintiffs or defendants. When a person who should join as a plaintiff refuses to do so, he may be made a defendant or, in proper cases, an involuntary plaintiff.

(b) Effect of Failure to Join. When persons who are not indispensable, but who ought to be parties if complete relief is to be accorded to those already parties, have not been made parties and are subject to the jurisdiction of the court as to both service of process and venue and can be made parties without depriving the court of jurisdiction of the parties before it, the court shall order them summoned to appear in the action. The court in its discretion may proceed in the action without making such persons parties, if its jurisdiction over them as to either service of process or venue can be acquired only by their consent or voluntary appearance or if, though they are subject to its jurisdiction, their joinder would deprive the court of jurisdiction of the parties before it, but the judgment rendered therein does not affect the rights or liabilities of absent persons.

FED. R. CIV. P. 19 (1938). This version remained unchanged until the 1966 amendment.

19 FED. R. CIV. P. 19 is entitled "Joinder of Persons Needed for Just Adjudication." Sections (a) and (b) of the rule state:

(a) Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been so joined, the court shall order that the person be made a party. If the person should join as a plaintiff but refuses to do so, the person may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and joinder of that party would render the venue of the action improper, that party shall be dismissed from the action.

(b) Determination by the Court Whenever Joinder is Not Feasible. If a person as described in subdivision (a)(1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment ren-

upon which both the pre and postamendment Rule were based, and often applied the Rule correctly, the text of the Rule sometimes caused misinterpretation.[20] The Federal Rules advisory committee listed a number of specific "[t]extual defects" in the original rule,[21] and stated that the Rule failed to point to the relevant factors to be considered in deciding whether an action should proceed without the absent person or be dismissed.[22]

Commentators had criticized Rule 19 extensively.[23] Generally, they contended that the Rule provided insufficient guidance to the district courts[24] and led to the elevation of form over substance, a jurisprudence of labels.[25] While the original Rule "could be and often was applied in consonance with" the propositions upon which the Rule was based,[26] it was often misapplied.[27]

One focus of the criticism of the pre-1966 Rule was the district courts' application of the concept of "indispensable" parties.[28] A draft of the proposed amended Rule which eliminated the term "indispensa-

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dered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Id.

20 The advisory committee wrote:

> The foregoing propositions [those upon which Rule 19 is based] were well understood in older equity practice and Rule 19 could be and often was applied in consonance with them. But experience showed that the [pre-1966] rule was defective in phrasing and did not point clearly to the proper basis of decision.

FED. R. CIV. P. 19 advisory committee's note (1966) (citation omitted).

21 The advisory committee explained:

(1) the expression "persons . . . who ought to be parties if complete relief is to be accorded to those already parties" was not adequately descriptive of the category,

(2) the term "indispensable" did not adequately describe the category intended by the rule,

(3) the terms "indispensable" and "joint interest" directed the courts' attention to the wrong factors,

(4) the use of the word "jurisdiction" caused confusion. *See* FED. R. CIV. P. 19 advisory committee's note (1966).

22 "The original rule did not state affirmatively what factors were relevant in deciding whether the action should proceed or be dismissed when joinder of interested persons was infeasible." FED. R. CIV. P. 19 advisory committee's note (1966).

23 The advisory committee's note refers to a number of critics, including: Reed, *supra* note 12; Hazard, *supra* note 7; N.Y. Temporary Comm. on Courts, *First Preliminary Report*, Legis. Doc. 1957 No. 6(b); N.Y. Judicial Council, *Twelfth Ann. Rep.*, Legis. Doc. 1946, No. 17; Joint Comm. on Michigan Procedural Revision, *Final Report*, Pt. III (1960); Note, *Indispensable Parties in the Federal Courts*, 65 HARV. L. REV. 1050 (1952); *Developments in the Law-Multiparty Litigation in the Federal Courts*, 71 HARV. L. REV. 874 (1958); MICH. GEN. COURT RULES, R. 205 (effective Jan. 1, 1963); N.Y. CIV. PRAC. L. & R., § 1001 (effective Sept. 1, 1963). FED. R. CIV. P. 19 advisory committee's notes (1966).

24 FED. R. CIV. P. 19 advisory committee's note (1966).

25 *See* Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments to the Federal Rules of Civil Procedure (1)*, 81 HARV. L. REV. 356, 362 (1967) (describing the classification of cases as based on a "sloganeering process").

26 FED. R. CIV. P. 19 advisory committee's note (1966).

27 FED. R. CIV. P. 19 advisory committee's note (1966) states:

> In some instances courts did not undertake the relevant inquiry or were misled by the jurisdiction fallacy. In other instances there was undue preoccupation with abstract classifications of rights or obligations, as against consideration of the particular consequences of the action.

Id.

28 "The indispensable party concept . . . has occasioned much confusion in the cases." Hazard, *supra* note 7, at 1255.

ble" was circulated,[29] but met with criticism.[30] Ultimately, the term was included in the final draft of the 1966 amendment,[31] but the advisory committee sought to limit its impact by noting that the word was used only in a "conclusory sense."[32]

The Supreme Court has noted that the 1966 amendment was not meant to constitute a change in principles.[33] Rather, the goal of the amendment was to remove the focus of the consideration from the abstract character of the rights of the parties[34] and to make it clear that:

> [w]hether a person is "indispensable," that is, whether the lawsuit must be dismissed in the absence of that person, can only be determined in the context of the particular litigation. . . . The decision . . . must be based on factors varying with the different cases, some such factors being substantive, some procedural, some compelling by themselves, and some subject to balancing against opposing interests.[35]

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29 The proposed amendment of Rule 19 read:

> Rule 19: Joinder of Persons Needed for Just Adjudication
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> (a) PERSONS TO BE JOINED IF FEASIBLE. Whenever a "contingently necessary" person, as hereafter defined, is subject to service of process and his joinder would not deprive the court of jurisdiction over the subject matter of the action, he shall be joined as a party to the action. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff. If the joined party objects to venue and his joinder would render the venue of the action improper, he shall be dismissed from the action.
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> A person is contingently necessary if (1) complete relief cannot be accorded in his absence among those already parties, or (2) he claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action in his absence may (i) as a practical matter substantially impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.
>
> (b) *Determination by Court Whenever Joinder not Feasible.* If a contingently necessary person cannot be made a party, the court shall determine whether in equity and good conscience the action ought to proceed among the parties before it or ought to be dismissed. The factors to be considered by the court include: first, to what extent a judgment rendered in the absence of the contingently necessary person might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the absence of the contingently necessary person would be adequate; fourth, whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

FED. R. CIV. P. 19 (Prelim. Draft of Proposed Amendments, 1964).

30 Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments to the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 366 (1967).

31 *See supra* note 19.

32 FED. R. CIV. P. 19 advisory committee's note (1966). The full text of the relevant section states:

> The subdivision uses the word "indispensable" only in a conclusory sense, that is, a person is "regarded as indispensable" when he cannot be made a party and, upon consideration of the factors above-mentioned, it is determined that in his absence it would be preferable to dismiss the action, rather than to retain it.

Id.

33 "The new text of the Rule was not intended as a change in principles." Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 116 n.12 (1968).

34 The goal of the amendment was to direct attention away from consideration of "the technical or abstract character of the rights or obligations of the persons whose joinder is in question." FED. R. CIV. P. 19 advisory committee's note (1966).

35 *Provident Tradesmens Bank & Trust Co.*, 390 U.S. at 118-119.

The amendment thus refocuses attention on the practical effects of proceeding with or dismissing the action.[36]

2. Rule 19 Today

Rule 19 is designed to protect three classes of interests: (1) the public's interest in preventing multiple and duplicative litigation, (2) the interest of the parties before the court in avoiding exposure to duplicate or inconsistent liability,[37] and (3) the absent person's interest in avoiding prejudice as a result of the decision.[38] The Rule is designed to assist the courts in "rendering complete justice with as little litigation as possible."[39]

Depending upon the circumstances and facts of the case, Rule 19 provides a court with three possible courses of action. First, the court might proceed with the action without the absent person. Rule 19 allows the court to proceed if it finds either (a) that the absent person is not necessary to the action, or (b) that the person is necessary but cannot be joined and is not "indispensable" to the action.[40] Second, the court might find the person is necessary, and joinable. In that case, Rule 19 requires joinder.[41] Finally, the court may find that the person is indispensable and, that joinder is not feasible. In this situation, the court must dismiss the action.[42]

Rule 19 establishes a three-part test to determine whether the court should proceed, order joinder of the absent person, or dismiss the case. First, a court must determine whether the person is "needed for just adjudication."[43] Rule 19(a) establishes two tests for determining whether a party is "necessary." A party is deemed necessary if "in his absence com-

36 "[T]he new version emphasizes the pragmatic consideration of the effects of the alternatives of proceeding or dismissing." *Id.* at 116 n.12.

37 While this particular goal is usually stated in terms of the party's interest, it should be noted that the courts also have an interest in avoiding subjecting a party to inconsistent liabilities. Courts have an interest in having their judgments enforced. Inconsistent judgments put the courts into conflict with each other. Or, should multiple actions occur in the same court, a court might find itself in conflict with itself.

38 Under a section entitled "*The Amended Rule*," the advisory note to the 1966 amendment states that:

> Clause (1) stresses the desirability of joining those persons in whose absence the court would be obliged to grant partial or "hollow" rather than complete relief to the parties before the court. The interests that are being furthered here are not only those of the parties, but also that of the public in avoiding repeated lawsuits on the same essential subject matter. Clause 2(i) recognizes the importance of protecting the person whose joinder is in question against the practical prejudice to him which may arise through a disposition of the action in his absence. Clause 2(ii) recognizes the need for considering whether a party may be left, after the adjudication, in a position where a person not joined can subject him to a double or otherwise inconsistent liability.

FED. R. CIV. P. 19 advisory committee's note (1966); *See also* Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments to the Federal Rules of Civil Procedure (I)*, 81 HARV. L. REV. 356, 365 (1967).

39 J. FRIEDENTHAL, M. KANE & A. MILLER, CIVIL PROCEDURE § 6.5 (1985).

40 Rule 19 does not specifically describe the situations in which the court may proceed without the absent person. Instead, they are the default situations in which the court finds it need not order either joinder or dismissal. *See* FED. R. CIV. P. 19, quoted *supra* note 19.

41 FED. R. CIV. P. 19(a).

42 FED. R. CIV. P. 19(b).

43 FED. R. CIV. P. 19(a).

plete relief cannot be accorded among those already parties."[44] A party is also necessary if he has an interest in the action which will be impaired by the action's disposition or which will leave another party subject to a substantial risk of multiple or inconsistent obligations.[45]

Second, if the party is necessary, a court must determine whether joinder is feasible. Rule 19's test for feasibility of joinder is whether the party is subject to service and whether the court will retain jurisdiction.[46]

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44 *Id.*

45 FED. R. CIV. P. 19(a) deems a party necessary if

> he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest.

Id.

46 Rule 19(a) states that if the "necessary" party is one "who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action [the party] shall be joined in the action." *Id.* The advisory committee's note states that "[i]f a party has a valid objection to venue and chooses to assert it, he will be dismissed from the action." FED. R. CIV. P. 19 advisory committee's note (1966).

The possibility of error creeps in here. The Rule says "*If* a person as described in subdivision (a)(1)-(2) hereof [a necessary party] cannot be made a party, the court shall [determine whether the party is indispensable]." FED. R. CIV. P. 19(b) (emphasis added). Despite the fact that the advisory committee's note makes it clear that this statement simply refers to *when* the court must proceed with the analysis, this language has been interpreted as introducing a condition precedent to *whether* the party can be indispensable.

The better interpretation is that the issue of joinability is only relevant as an indication of *when* the court will have to continue its analysis to determine whether to proceed, or may simply order joinder. First, note that the title of subparagraph (b) of Rule 19 is "Determination by Court *Whenever* Joinder not Feasible." FED. R. CIV. P. 19(b) (emphasis added).

The advisory committee's note actually substitutes the word "when" for the Rule's "if" in the portion of Rule 19(b) quoted above:

> *When* a person as described in subdivision (a)(1)-(2) cannot be made a party, the court is to determine whether in equity and good conscience the action should proceed among the parties already before it or should be dismissed.

FED. R. CIV. P. 19 advisory committee's note (1966) (emphasis added). The note also makes this point in several other places:

> Whenever feasible, the persons materially interested in the subject of an action . . . should be joined as parties so that they may be heard and a complete disposition made. *When* this comprehensive joinder cannot be accomplished . . . the case should be examined pragmatically and a choice made between the alternatives of proceeding in the action in the absence of the interested persons, and dismissing the action. . . .
>
> The subdivision uses the word "indispensable" in a conclusory sense, that is, a person is "regarded as indispensable" *when* he cannot be made a party, and upon consideration of the factors above—mentioned, it is determined that in his absence it would be preferable to dismiss the action, rather than to retain it.

Id. (emphasis added).

Despite this evidence, some commentators seem to interpret the issue of joinability as a substantive criterion for whether or not a party may be regarded as indispensable. Thus, one treatise states "an indispensable party is, by definition, one whose joinder is not feasible." 2A J. MOORE & J. LUCAS, MOORE'S FEDERAL PRACTICE ¶ 12.08[3] n.4 (1987). This interpretation constitutes a significant change from traditional compulsory joinder doctrine. The idea that the 1966 amendment of Rule 19 constituted such a change has been specifically rejected. Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 116 (1968) ("The new text of the Rule [19] was not intended as a change in principles."), *see* LAWYERS CO-OPERATIVE PUBLISHING CO., FEDERAL PROCEDURE § 59:76 (1984) ("[T]he 1966 revision of FRCP 19 . . . was not intended as a change in principle.").

Feasibility of joinder is not relevant to the purposes of compulsory joinder as defined by Rule 19. The interests of the parties, the absent persons, and the court are the same whether or not the joinder of the absent person is feasible. *See infra* note 131 and accompanying text.

Further, feasibility of joinder is too inflexible a criterion of indispensability. Suppose a court found that an absent person was necessary and joinder was feasible. But, for some reason, that

If joinder is feasible, the Rule states the person "shall be joined."[47]

Finally, if joinder of a necessary party is not feasible, Rule 19(b) states that "the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person thus being regarded as indispensable."[48] The Rule lists several factors a court should consider in making this determination, including the extent of the effect of any judgment, the degree to which the judgment can be shaped to avoid an undesirable effect, the availability of other measures to lessen any prejudice, the adequacy of any judgment in the person's absence, and the availability of a remedy to the plaintiff if the case is dismissed.[49]

Thus, the new wording of Rule 19 brings the issue of compulsory joinder full circle. The pragmatic analysis used by the early English equity courts has, once again, been established as the optimal approach to the issue of compulsory joinder of absent persons.

II. Rule 12 and Parties Needed for Just Adjudication

Rule 12 specifies the timing and procedures for pleading defenses and objections to the complaint.[50] Rule 12 includes three references to

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person intentionally avoided service of process. To say that the court could not find the party indispensable and must continue the action puts the court into an untenable position.

A better interpretation of Rule 19 is that an absent person may be indispensable without reference to whether joinder of the person is feasible. The issue of joinability is only relevant concerning what course of action the court should take *when* it determines the absent person is necessary.

47 FED. R. CIV. P. 19(a).

48 FED. R. CIV. P. 19(b).

49 FED. R. CIV. P. 19(b) provides:

> The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

Id.

50 FED. R. CIV. P. 12 is entitled "Defenses and Objections—When and How Presented—By Pleadings or Motion—Motion for Judgment on the Pleadings." The relevant sections of the rule state:

> (b) Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, crossclaim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (2) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief.
>
> . . .
>
> (g) Consolidation of Defenses in Motion. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to the party. If a party makes a motion under this rule but omits therefrom any defense or objection then available to the party which this rule permits to be raised by motion, the party shall not

Rule 19 parties (parties needed for just adjudication).[51] There is a slight but critical difference in wording between one of the references and the other two.[52] Prior to 1966, this difference did not exist. This difference in wording creates a situation which leads courts to misinterpret Rule 19 and treat similar parties differently. This section explains the origins and consequences of the difference between these references.

A. *The References to Rule 19 in Rule 12(b) & (g)*

Rule 12(b) is the basic provision governing when defenses to a complaint may or must be pleaded. It provides that "[e]very defense . . . to a claim . . . shall be asserted in the responsive pleading thereto if one is required, except that the following may at the option of the pleader be made by motion: . . . (7) failure to join a party under Rule 19."[53] A party is allowed to plead this defense, and certain other defenses listed in Rule 12,[54] prior to the answer because they are "matters of abatement"[55] which may eliminate the need to file an answer. Expedited treatment of these defenses permits more efficient adjudication.[56]

Subsection (g) of Rule 12 deals with whether a party may bring successive Rule 12 motions. It limits a party to a single Rule 12 motion. Rule 12(g) provides that if a party makes a Rule 12 motion and omits any of the Rule 12 objections from the motion, the party may not bring another motion based on any of the Rule 12 objections, except for certain objections automatically preserved from such waiver by Rule 12(h)(2).[57]

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thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h)(2) hereof on any of the grounds there stated.

(h) Waiver or Preservation of Certain Defenses.

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a) or by motion for judgment on the pleadings, or at trial on the merits.

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

Id.

51 *See infra* text accompanying notes 53-63.

52 *See infra* text accompanying notes 62-63.

53 FED. R. CIV. P. 12(b).

54 *See* FED. R. CIV. P. 12(b)(1)-(6), quoted *supra* note 50.

55 J. FRIEDENTHAL, M. KANE, & A. MILLER, CIVIL PROCEDURE § 5.24 (1985).

56 In cases where the issue of joinder is linked with the facts of the case, however, the decision on the motion may be delayed until sufficient facts are developed. *See, e.g.*, Francis Oil & Gas, Inc. v. Exxon Corp., 661 F.2d 873 (10th Cir. 1981).

57 FED. R. CIV. P. 12(g). The original Rule 12 did not require this consolidation. This failure led to dilatory trial practices. 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1384 (1969). The section was amended in 1948 to eliminate these practices. "The enforced consolidation of matters in the motion, the interdicting of successive motions, is justified as helping to avoid piecemeal, repetitious handling of the early phase of a lawsuit before the defendant has committed himself even to a full statement of his own position by answer." Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (II)*, 81 HARV. L. REV. 501, 605 (1968). For a discussion of Rule 12(h)(2), *see infra* notes 70-74 and accompanying text.

Since it refers to all Rule 12 defenses as a group, Rule 12(g) incorporates the Rule 12(b)(7) reference to Rule 19 parties.

B. *The Genesis of Inequity: The Reference to Rule 19 in Rule 12(h)*

Rule 12(h) deals with waiver of the defenses listed in Rule 12(b). Rule 12(h)(1) provides that the defenses of lack of personal jurisdiction, improper venue, insufficiency of process, and insufficiency of service,[58] are waived if they are either omitted from a Rule 12(b) motion or are neither made by motion nor included in a responsive pleading. Rule 12(h)(2) provides that the defenses of failure to state a legal claim or defense[59] and "failure to join a party indispensable under Rule 19"[60] are not waived by failure to plead in a 12(b) motion or in the answer. Instead, a party may make these claims in any pleading, at trial, or even on appeal.[61]

Note that the Rule 12(h)(2) reference to Rule 19 parties differs from the Rule 12(b) reference.[62] Rule 12(b) refers to a "party under Rule 19," which includes both "necessary" parties, as defined in Rule 19(a), and "indispensable" parties, as defined in Rule 19(b). Rule 12(h)(2), however, refers only to "a party indispensable under Rule 19."[63]

Assuming there are distinct objections for failure to join necessary and indispensable parties,[64] Rule 12(h) nowhere mentions the objection of failure to join a necessary party. The objection is neither specifically preserved in 12(h)(2), nor listed among those objections waived in 12(h)(1). This leaves courts without guidance as to whether that particular objection is waived by, or preserved against, failure to plead in or before the answer. Since Rule 12(g) prevents a second Rule 12 motion based on *any* Rule 12 objection, failure to join a necessary party probably could not be the basis of a second Rule 12 motion.[65] But nothing in Rule 12(h) indicates the status of this defense if there is no Rule 12 motion. Furthermore, if a Rule 12 motion is made, Rule 12(h) does not address

58 These are the defenses listed in Rule 12(b)(2)-(5).

59 FED. R. CIV. P. 12(b)(6).

60 FED. R. CIV. P. 12(h)(2).

61 These defenses "may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits." FED. R. CIV. P. 12(h)(2). This section has been interpreted to allow the objection of failure to join an indispensable party to be raised for the first time on appeal. Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 111 (1968). This protection from waiver by failure to plead is not, however, absolute:

> [W]hen the moving party is seeking dismissal in order to protect himself against a later suit by the absent person . . . and is not seeking vicariously to protect the absent person against a prejudicial judgment, . . . his undue delay in making the motion can properly be counted against him as a reason for denying the motion.

FED. R. CIV. P. 19 advisory committee's note (1966).

62 The Rule 12(b) reference to Rule 19 is incorporated in Rule 12(g).

63 This creates a question as to just what defense is preserved in Rule 12(h)(2). *See infra* text accompanying note 78.

64 *See infra* text accompanying note 128.

65 On the other hand, as explained below, the correct interpretation of Rule 19 eliminates the artificial division of parties into the necessary and indispensable party categories, *see infra* text accompanying note 128. Thus, a motion to join a necessary party under Rule 19, like an objection for failure to join an indispensable party, should be available at any stage in the proceedings. *See infra* notes 120-128 and accompanying text.

the question of whether the objection may be raised in the answer or in the ways listed in Rule 12(h)(2).

This lack of guidance creates the inequitable treatment of necessary parties under the Federal Rules. Rule 19 was amended to eliminate courts' attention to "abstract classifications of rights" and focus the courts on the practical effects of proceeding with or dismissing the case.[66] Thus, a party can only be considered indispensable *after* consideration of the factors in Rule 19.[67] But the difference in wording within Rule 12 leads the courts to look for a method of distinguishing necessary parties from indispensable parties before engaging in the Rule 19 analysis, in direct contradiction to the purpose of Rule 19.

C. *Planting the Seed: The 1966 Amendment of Rule 12*

Prior to 1966, the wording of the separate references in Rule 12 to Rule 19 parties was consistent. Both Rule 12(b)(7) and Rule 12(h)(2) used the same language to refer to Rule 19 parties.[68] But when Rule 19 was amended in 1966, the Rule 12 references to Rule 19 also had to be revised. In fact, the advisory committee's note specifically explains that Rule 12(b)(7) was changed "to accord with the amendment of Rule 19."[69]

Rule 12(h) underwent an independent revision in 1966.[70] Prior to that time, the circuits were split over whether a Rule 12(b) objection that had been omitted from a 12(b) motion could be pleaded in the answer.[71] Some courts had decided that the failure to include the objection constituted a waiver of the objection.[72] Other courts held that a party could still plead the objection.[73] The 1966 amendment of Rule 12(h) was designed to eliminate this ambiguity.[74]

Thus, in 1966, both Rules 19 and 12(h) simultaneously underwent extensive revision. The proposed Rule 19 eliminated the term "indis-

66 FED. R. CIV. P. 19 advisory committee's note (1966).

67 *See supra* note 32.

68 Both sections referred to "an indispensable party under Rule 19." FED. R. CIV. P. 19 (1963). Of course, the pre-1966 Rule 19 spoke only in terms of "indispensable" parties, *see supra* note 18, so such a reference was appropriate.

69 FED. R. CIV. P. 12 advisory committee's note (1966).

70 Rule 12(g) also underwent minor amendment to conform to the amendment of Rule 12(h). 5 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1384. The major amendment of Rule 12(g) occurred in 1948. The original Rule 12 simply stated that a party could plead Rule 12(b) objections in a pre-answer motion. Defendants would occasionally abuse this privilege by bringing a series of Rule 12(b) motions, each pleading a different objection, for purely dilatory purposes. The 1948 amendment required the consolidation of these defenses in a single motion. "The enforced consolidation of matters . . . is justified as helping to avoid piecemeal, repetitious handling of the early phase of a lawsuit before the defendant has committed himself even to a full statement of his own position by answer." Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (II)*, 81 HARV. L. REV. 501, 605 (1968).

71 *See* Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (II)*, 81 HARV. L. REV. 501, 605 (1968).

72 *See, e.g.*, Keefe v. Dorounian, 6 F.R.D. 11 (N.D. Ill. 1946); Elbinger v. Precision Metal Workers Corp., 18 F.R.D. 282 (S.D.N.Y. 1950).

73 *See, e.g.* Phillips Neset v. Baker, 121 F.2d 752 (9th Cir. 1941); Crum v. Graham, 32 F.R.D. 173 (D. Mont. 1963).

74 The advisory committee's note specifically states: "Amended subdivision (h)(1)(A) eliminates the ambiguity." FED. R. CIV. P. 12 advisory committee's note (1966).

pensable."[75] The final amendment, however, reinserted the term, but only in a conclusory sense.[76] Rule 12(b) was amended to reflect this change in Rule 19. But Rule 12(h) was left with the same reference to Rule 19 that was used in the pre-1966 rule.

This difference in language is the basis for the disparate treatment of joinable and non-joinable parties which have identical interests in an action. Almost certainly, the difference was not intentional. Instead, the retention of the pre-1966 reference to Rule 19 in Rule 12(h)(2) was probably a mere oversight in drafting.[77]

First, the very fact that the wording of the references in Rules 12(b) and 12(h) is inconsistent indicates that the distinction was unintentional. If the drafters intended to create different objections for failure to join a necessary party and for failure to join an indispensable party, the objections would be distinguished in Rule 12(b), where possible objections are listed. This internal inconsistency seems to create a situation where Rule 12(h)(2) preserves an objection that does not exist (failure to join an *indispensable* party) while the Rule 12(b)(7) objection (failure to join a party under Rule 19) is not included in Rule 12(h)'s comprehensive guide to waiver or preservation of the Rule 12 defenses.[78]

Further, this inconsistency means that the ambiguity the 1966 amendment to Rule 12(h) was designed to eliminate still exists with regard to the objection of failure to join a necessary party. Rule 12(h)(1) does not include the objection as one that is waived if it is not pleaded in a 12(b) motion or in the responsive pleading. Neither does Rule 12(h)(2) specify that the objection is preserved against such waiver.[79]

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75 *See supra* note 29 and accompanying text.

76 *See supra* note 32.

77 As one commentator noted:

> [T]he discrepancy in the wording of Rule 12(b)(7) and Rule 12(h)(2) probably reflects a drafting oversight on the part of the Advisory Committee that prepared the 1966 amendments. Both Rule 12(h) and Rule 19 were undergoing extensive revision simultaneously; at the same time Rule 12(b)(7) was being altered to conform it with the changes in Rule 19. It is quite possible that in the final adjustment of Rule 12(h) and Rule 19, which reintroduced a reference to the indispensable party concept in the latter rule, the semantic discrepancy between Rule 12(b)(7) and Rule 12(h)(2) and the absence of a specific provision governing rule 19(a) persons were overlooked.

7 C. WRIGHT, A. MILLER, & M. KANE, FEDERAL PRACTICE AND PROCEDURE § 1609 (1986).

78 One might argue that the drafters assumed knowledge of the different classifications of parties under Rule 19 (a difficult argument considering the drafters comments that distinctions based on abstract classifications of parties are not appropriate to Rule 19 analysis, *see supra* notes 24-27, 32, 34 and accompanying text), and so intended that Rule 12(h)(2) would preserve one category of objection allowed by Rule 12(b)(7). That, however, creates the difficult question of why the drafters then flatly ignored the other category.

79 *See supra* note 50 for the text of Rule 12(h)(2). The ambiguity may be at least partially resolved by reference to the Rule 12(b) admonition that "Every defense, in law or fact . . . shall be asserted in the responsive pleading." FED. R. CIV. P. 12(b). This section would seem to require a finding that the objection is waived if not pleaded in the answer. Rule 12(b) goes on, however, to say that "[a] motion making any of these [Rule 12(b)] defenses shall be made before the pleading if a further pleading is permitted." FED. R. CIV. P. 12(b). This statement specifies when a party must bring the motion if a further pleading is permitted, but does not say if there is a time limit on the motion when no further pleading is permitted. Arguably, once the Rule 7(a) pleadings are completed, a party could bring the motion at any time. Rule 12(g) solves the problem once a Rule 12(b) motion is made, but Rule 12(h) does not provide guidance if no Rule 12(b) motion is made. In any case, this analysis does not resolve the question of whether the objection may be pleaded in the answer even if omitted from a 12(b) motion. It is also interesting to note that the courts that have

Second, the Rules themselves contradict the idea that a motion that results in an order requiring joinder of an absent person may only be brought at certain stages of the action.[80] Rule 21 specifically states that a party may bring a motion to require joinder at any stage of the proceeding, without limitation as to the reason.[81]

Third, there is no reason to treat the two objections differently. The goals of Rule 19 apply equally to both necessary and indispensable parties.[82] Indeed, there may be absolutely no difference whatsoever between the position of an indispensable party and a necessary party in relation to the goals of requiring compulsory joinder. Yet, because some courts interpret Rule 12 to distinguish between these parties, they may be treated differently.[83]

Fourth, the fact that the advisory committee's note suggests no reason for differentiating between the two objections indicates that the differentiation was unintentional. An intentional differentiation would have constituted a significant change in the law.[84] If the drafters consciously decided to treat a Rule 19 objection which seeks joinder of a necessary party differently from a Rule 19 objection which seeks joinder of an indispensable party, some explanation was in order.[85]

Finally, two statements in the advisory committee's notes to the 1966 amendments indicate the drafters were not even aware of the different treatment accorded necessary and indispensable parties. The advisory committee's note to the 1966 amendment of Rule 19 states:

> [a] person may be added as a party at any stage of the action . . . and a motion to dismiss, on the ground that a person has not been joined and justice requires that the action should not proceed in his absence,

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ruled that the objection is waived if not pleaded in a Rule 12(b) motion or the answer have relied primarily on Rule 12(h), not Rule 12(b). *See infra* note 100.

80 While the objection is in the form of a motion to dismiss for failure to join a party, Rule 19(a) defines a necessary party as one that meets the Rule 19(a) criteria and for whom joinder is feasible. The Rule states that such a party "shall be joined" and that "[i]f he has not been so joined, the court shall order that he be made a party." FED. R. CIV. P. 19(a). Thus, the objection for failure to join a necessary party is tantamount to a motion to require joinder.

81 The Rule states that "Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just." FED. R. CIV. P. 21.

82 The policy of avoiding prejudice to the absent party, multiple or inconsistent liability for the defendant, and inefficient use of judicial resources is just as strong when dealing with absent persons that may be joined as it is with absent persons that cannot be joined. *See infra* notes 129-133 and accompanying text.

83 *See infra* notes 94-100 and accompanying text. It is particularly ironic that courts should interpret Rules 12 and 19 in such a way that they ignore the absent party's interest in instances when there is a relatively simple and effective solution—joinder—and accord great weight to the same interest when the only option is dismissal, leaving the dispute unresolved.

84 Both the advisory committee and the Supreme Court have noted that the new text of Rule 19 was *not* designed to constitute such a change. *See supra* note 33. *See also* FED. R. CIV. P. 19 advisory committee's note (1966).

85 The advisory committee's notes generally explain the purpose of an amendment and its effect on the law. *E.g.*, FED. R. CIV. P. 1 advisory committee's note (1966) states, "This is a fundamental change," referring to the use of the Rules in admiralty cases, and FED. R. CIV. P. 18 advisory committee's note (1966) states, "Rule 18(a) is now amended . . . to overcome the *Christianson* decision and similar authority."

> may be made as late as the trial on the merits (see Rule 12(h)(2) as amended; *cf.* Rule 12(b)(7), as amended).[86]

The committee here treats both joinder (which results from failure to join a necessary party) and dismissal (which results from failure to join an indispensable party) the same. The reference to Rules 12(h)(2) and 12(b)(7) to support both the propositions that a party may be added at any time and that a party may be dismissed when "justice requires," indicates that any apparent differentiation between the two parties was unintentional.[87]

More importantly, the advisory committee's note says "[a] person may be added as a party at any stage of the action."[88] Only necessary parties are added; the unavailability of indispensable parties causes dismissal. The members of the advisory committee apparently believed a party could bring a motion that resulted in joinder of a party at any stage of the action. Hence, they undoubtedly believed the objection of failure to join a necessary party was preserved in the same way as failure to join an indispensable party.[89]

The advisory committee's note to the 1966 amendment of Rule 19 also states:

> [t]he subdivision uses the word "indispensable" only in a conclusory sense, that is, a person is "regarded as indispensable" when he cannot be made a party and, upon consideration of the factors above-mentioned, it is determined that in his absence it would be preferable to dismiss the action rather than to retain it.[90]

This comports with the committee's goal of eliminating the grouping of parties into inflexible categories in favor of a pragmatic approach to the issue of joinder. The advisory committee's notes to the amendment of Rule 12(b)(7) specifically refer to this paragraph.[91] In order to treat the objection of failure to join a necessary party differently from failure to join an indispensable party, one must distinguish between the two categories prior to undertaking the Rule 19 analysis. This contradicts the

86 FED. R. CIV. P. 19 advisory committee's note (1966) (citation omitted).

87 *See* FED. R. CIV. P. 19 advisory committee's note (1966).

88 FED. R. CIV. P. 19 advisory committee's note (1966).

89 This comment is identical to a comment in the advisory committee's notes to the proposed, but withdrawn, amendment. *See supra* note 29 for the text of the proposed amendment. In that text, this comment is immediately preceded by a paragraph which explains that the term "indispensable" has been eliminated.

> The subdivision does not use the word "indispensable" which has often been employed in the past as descriptive of persons in whose absence an action should be dismissed. "Indispensable" has suggested some iron rule of joinder based on categorization of rights, whereas a different approach is taken in the present subdivision.

FED. R. CIV. P. 19 (Prelim. Draft of Proposed Amendments) advisory committee's note (1964). These identical comments to Rule 19 language that does and does not include the concept of indispensability indicate that the drafters of the Rules believed that a motion to compel joinder of a party is available at any time without reference to the concept of indispensability.

90 FED. R. CIV. P. 19 advisory committee's note (1966).

91 The Notes to Rule 12 say "See the Advisory Committee's Note to Rule 19, as amended, especially the third paragraph therein before the caption 'Subdivision (c).' " FED. R. CIV. P. 12 advisory committee's note (1966). Thus, the Rule 12(b)(7) reference to Rule 19 parties should be interpreted as referring to a defense that does not distinguish between necessary and indispensable parties.

advisory committee's statement that the term "indispensable" is only appropriate as a conclusion reached after the Rule 19 analysis.

III. Judicial Interpretation of Rule 12(h)(2)

The inconsistent references to Rule 19 parties in Rule 12 have led courts to treat parties inconsistently. While the courts which have specifically considered the question have ruled that the objection of failure to join a necessary party is waived if not pleaded in a Rule 12(b) motion or in the answer,[92] other courts have allowed the objection to be made after the answer.[93]

A. *Courts Holding the Joinder Objection is Waived*

In *Citibank N.A. v. Oxford Properties & Finance Ltd.*,[94] the Ninth Circuit Court of Appeals cited Rule 12 (emphasizing Rule 12(h)), saying that "[i]n federal civil procedure, failure to join a necessary party is waived if the objection is not made in the first responsive pleading; it is only the absence of an indispensable party which may (possibly) be raised later."[95] The Tenth Circuit has taken the same position. In *State Farm Mutual Automobile Insurance Co. v. Mid-Continent Casualty Co.*,[96] the Tenth Circuit pointed out that "[n]o objection was made that [the absent person] was a necessary party under Rule 19(a), so that objection is waived."[97] Finally, in *North Dixie Theatre Inc. v. McCullion*,[98] the district court for the Southern District of Ohio recognized the absent parties were necessary, but prevented the defendant from obtaining their joinder. The court held that the defendant "waived his right to present [the objection] by not presenting it in his initial motion."[99]

These courts relied primarily on Rule 12(h) in concluding that the defense of failure to join a necessary party is waived if not pleaded in the first responsive pleading.[100]

92 *See infra* notes 94-100 and accompanying text.

93 *See infra* notes 101-07 and accompanying text.

94 688 F.2d 1259 (9th Cir. 1982).

95 *Id.* at 1262 n.4 (parentheses in original). The court cited "Fed. R. Civ. P. 12, esp. 12(h)." The court also cited Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 110-11 (1968). The Ninth Circuit has also reached the opposite conclusion, but without specific consideration of the issue. *See infra* notes 104-07 and accompanying text.

96 518 F.2d 292 (10th Cir. 1975).

97 *Id.* at 294.

98 613 F.Supp. 1339 (S.D. Ohio 1985).

99 The court stated that

> [w]hile the court does not dispute [defendant's] contention that the [absent persons] are "persons to be joined if feasible," Rule 19(a), the Court will overrule this motion, because [defendant] waived his right to present it by not presenting it in his initial motion . . . Rule 12(g) provides that when a party asserts a defense before answering a complaint, that party must assert all defenses which can be raised by motion under Rule 12(b) or the defenses are waived. . . . Although Rule 12(h)(2) preserves an *indispensable* party objection, this provision does not apply to persons who are merely necessary under Rule 19(a).

Id. at 1346 (emphasis in original).

100 The *Citibank* court cited "Fed. R. Civ. P. 12, esp. 12(h)." 688 F.2d at 1262 n.4. The *State Farm* court cited "F.R.Civ.P. 12(h)(2)." 518 F.2d at 294. The court in *North Dixie Theatre* cited Rule 12(h)(1). 613 F.Supp. at 1346. See *infra* text accompanying note 124 for a discussion of this analysis. The *North Dixie Theatre* court relied on Rule 12(g) as well, *id.*, but misread the rule. Rule 12(g)

B. *Courts Holding the Joinder Objection is Preserved*

At least two circuit courts have permitted the objection of failure to join a necessary party to be raised at a point in the proceedings at which the courts above may have held it to have been waived. *Gentry v. Smith* [101] involved a contract for the sale of a hotel and the corporation that owned it. The plaintiff sued for rescission against the individual purchaser, but not the corporation. The Fifth Circuit held that the district court should consider the defendant's post trial motion for joinder.[102] The court did not refer to Rule 12 but said that "the interests of justice and judicial economy would be served by joinder or consolidation, notwithstanding the tardiness of the motion to add a party. . . . [T]he joinder of the [absent person] is feasible, desirable, and would not destroy the district court's diversity jurisdiction."[103]

In *McCowen v. Jamieson*,[104] the Ninth Circuit Court of Appeals considered a suit involving a Department of Agriculture decision regarding food coupons. The plaintiff brought an action against the state agency which had followed the Department's instructions. On appeal, the defendants argued for the first time that the Secretary of Agriculture was a necessary party whose joinder should have been required. In remanding the action to the district court, the Ninth Circuit noted the plaintiff's argument that the objection of failure to join a necessary party could not be raised for the first time on appeal. The court responded that "[t]his argument is wrong as a matter of law. The issue is sufficiently important that it can be raised at any stage of the proceedings—even *sua sponte*."[105] The court did not mention its decision in *Citibank* [106] two years earlier, where it held that such an objection under the same rules of procedure was waived.[107]

Thus, the failure of Rule 12(h) to specify the status of the objection of failure to join a necessary party has created a situation in which parties

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does not provide that any omitted defense is waived; it simply prohibits a second 12(b) motion. *See* FED. R. CIV. P. 12(g), quoted *supra* note 50.

These courts did not address how a court can determine whether a party is necessary but not indispensable without undertaking the analysis required by Rule 19. Since "[t]here is no prescribed formula for determining in every case whether a person . . . is an indispensable party," Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 117 n.14 (1968) (citation omitted), and "[w]hether a person is indispensable . . . can only be determined in the context of a particular litigation," *id.* at 117, it would seem a court must analyze the objection before it can determine the absent person's status.

101 587 F.2d 571 (5th Cir. 1973).

102 *Id.* at 580.

103 *Id.* at 579-80. Note that if a court applies the analysis that only a non-joinable party may be indispensable, *see supra* note 46, the party this court is discussing can only be classified as "necessary."

104 724 F.2d 1421 (9th Cir. 1984).

105 In support, the court cited Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102, 111 (1968). The court went on to say, "We are acting to protect the Secretary's interest, not that of the appellants. We refuse to allow the Secretary to be injured by appellants' error." 724 F.2d at 1424.

106 Citibank N.A. v. Oxford Properties & Fin. Ltd., 688 F.2d 1259 (9th Cir. 1982).

107 Interestingly, the Ninth Circuit cited Provident Tradesmens Bank & Trust Co. v. Patterson, 390 U.S. 102 (1968), in support of both *McCowen*, 724 F.2d at 1424, and *Citibank*, 688 F.2d at 688 n.4. Thus, different panels of the same court have cited the same case in support of opposite conclusions.

that have identical interests in an action may be treated differently in different circuits, and even within the same circuit.

IV. An Explanation of Why Necessary and Indispensable Parties Should Not be Treated Differently

The disparity in the Rule 12 references to Rule 19 parties has resulted in disparate treatment of necessary and indispensable parties. This section discusses whether there is a logical basis for such a difference in treatment and concludes that the goals of Rule 19 would be better served by eliminating the anomalous distinction.

A. *Arguments for Disparate Treatment of Necessary and Indispensable Parties*

Courts that have ruled that the objection of failure to join a necessary party is waived if it is not pleaded in the first responsive pleading have not fashioned a rationale for their conclusion.[108] But one commentator has suggested that there is a logical basis on which to distinguish the objection of failure to join a necessary party from the objection of failure to join an indispensable party.[109] Moore's Federal Practice suggests two reasons for a distinction: first, because the absence of an indispensable party leads to dismissal of the case,[110] and second, because allowing the objection would permit a defendant to delay the trial.[111] One can also argue for distinguishing between the objections because of differences in the court's discretion as to how to respond. None of these reasons, however, are persuasive.

The argument that the objections should be treated differently because failure to join an indispensable party results in dismissal, while failure to join a necessary party results in joinder, misses the point. Failure to join an indispensable party results in dismissal because the absent person's interests are so important that it would be inequitable for the court to proceed without her.[112] To the degree that a necessary party's interests may be identical to an indispensable party's interests,[113] it is equally inequitable to allow the court to continue in the absence of the necessary party. The fact that joinder of the necessary party is feasible simply means that a less drastic solution to the problem exists. The fact that there is a less drastic solution should not be taken as a reason to ignore the problem.

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108 The courts that have held the objection of failure to join a necessary party is waived simply state so as a conclusion. *See infra* notes 120-21 and accompanying text.

109 Recall that there is a question as to whether there actually are distinct objections of failure to join a necessary party and failure to join an indispensable party. *See supra* note 78 and accompanying text. For the purpose of this section, the distinction will be assumed.

110 "The distinction between the timing of an objection for non-joinder of a necessary party and an objection for failure to join an indispensable party is logical, for the absence of an indispensable party necessitates dismissal regardless of when the objection is made." 3A J. MOORE, J. LUCAS, & G. GROTHEER, MOORE'S FEDERAL PRACTICE ¶ 19.05[2] (2d ed. 1987).

111 "[A] party's objection to the non-joinder of a person whose joinder is feasible will be treated as untimely if made after the pleadings are closed, since a defendant should not be allowed to postpone his objection until trial when joinder will inevitably delay resolution of the controversy." 3A J. MOORE, J. LUCAS, & G. GROTHEER, MOORE'S FEDERAL PRACTICE ¶ 1905[2] (2d ed. 1987).

112 FED. R. CIV. P. 19(b).

113 *See supra* text accompanying notes 82-83.

Further, failure to join a necessary party *does* result in dismissal. If the court, pursuant to Rule 19(a), orders a party to join an absent person and the party fails to join that person, the court may order the case dismissed for failure to comply with a court order.[114] It is only when the present party joins the necessary party that dismissal is avoided.

Possible delay of the trial is also an insufficient basis upon which to distinguish the objections. It seems illogical to say that possible delay of the action is a reason to ignore an absent person's interests, but dismissal of the action is not.[115] If anything, logic dictates the converse result. Further, note that the right to bring either objection is not absolute but is subject to the court's determination that it is exercised in good faith.[116]

One possible reason to distinguish between the two objections is that the court has less discretion as to its response to one than it does to the other. If a person is necessary (that is, he meets the criteria of Rule 19(a) and joinder is feasible), the Rule states that the person "shall be joined."[117] It seems the court is required to order joinder, no matter what the circumstances. If joinder of the party is not feasible, however, the court may consider any number of factors and the final determination as to the best course of action is within the court's discretion. Thus, it might be argued that because the court's response to the objection of failure to join a necessary party is restricted, the availability of the objection should also be restricted. But, as noted above,[118] the objection is subject to the court's determination that it is brought for the proper reason and with sufficient promptness.[119] These controls, along with the strong policies underlying Rule 19, lead to the conclusion that this, also, is an insufficient basis for a distinction between the availability of the objections.

B. *Errors in the Rationale Holding the Objection for Failure to Join a Necessary Party Waived*

Courts that have ruled that the objection of failure to join a necessary party is waived if it is not pleaded in the first responsive pleading

114 "For failure of the plaintiff . . . to comply with . . . any order of court, a defendant may move for a dismissal of an action or any claim against the defendant." FED. R. CIV. P. 41(b).

115 Dismissal will certainly delay the action and may, if the statute of limitations has run or there is no other forum in which the case may be brought, actually result in loss of the action. "[R]aising the issue of failure to join an indispensable party late in the proceedings may be devastating to a plaintiff's cause of action, for the plaintiff will be out of court and will have to start anew, and might then be barred by the applicable statute of limitations." 3A J. MOORE, J. LUCAS, & G. GROTHEER, MOORE'S FEDERAL PRACTICE ¶ 19.05[2] (1987).

116 [W]hen the moving party is seeking dismissal in order to protect himself against a later suit by the absent person . . . and is not seeking vicariously to protect the absent person against a prejudicial judgment . . . his undue delay in making the motion can properly be counted against him as a reason for denying the motion.

FED. R. CIV. P. 19 advisory committee's note (1966).

117 FED. R. CIV. P. 19(a).

118 *See supra* note 116.

119 Further, an interpretation of Rule 19 in which the issue of feasibility of joinder is considered simply an indication of when the court should engage in certain analysis, *see supra* note 46, might allow the conclusion that the court can consider all the factors listed in Rule 19 in its determination of whether to require joinder of a necessary party as well as whether to order dismissal because of an indispensable party.

have relied primarily on Rule 12(h).[120] While the courts refer to the Rule without explanation, they seem to be reading the Rule to imply that the defense is waived by failure to plead because it is not included as one of the defenses specifically preserved by Rule 12(h)(2).[121] This conclusion, however, does not follow from the premises.[122] The fact that Rule 12(h)(2) does not preserve the defense does not necessarily mean that it is waived.[123] As discussed above,[124] Rule 12(h) is silent on the issue of waiver of the objection of failure to join a necessary party by failure to plead in a Rule 12(b) motion or answer. The objection is neither specified as preserved in Rule 12(h)(2) nor specified as waived in Rule 12(h)(1). In fact, in the Ninth Circuit, where the court held that a Rule 12 defense which was omitted from a Rule 12(b)(6) motion could be pleaded in the answer under the old Rule 12,[125] the defense should still be available today, since Rule 12(h)(1) does not specify it as waived.[126]

Furthermore, this limited approach to required joinder is contradicted by Rule 21, which states that "[p]arties may be dropped or *added* by order of the court *on motion of any party* or of its own initiative *at any stage of the action* and on such terms as are just."[127] It is unreasonable to

120 *See supra* note 100.

121 The courts that have held the objection of failure to join a necessary party is waived make the statement as a conclusion contrasted to the fact that the defense of failure to join an indispensable party is preserved. Thus, the court in State Farm Mut. Auto. Ins. Co. v. Mid-Continent Casualty Co., 518 F.2d 292 (10th Cir. 1975), suggested that "[n]o objection was made that [the absent party] was a necessary party under Rule 19(a), so that objection is waived. Rather, we are concerned with the issue of whether [the absent party] is an indispensable party under Rule 19(b). This objection can be made at any time." *Id.* at 294. The court in Citibank N.A. v. Oxford Properties & Fin. Ltd., 688 F.2d 1259 (9th Cir. 1982), asserted, "In federal civil procedure, failure to join a necessary party is waived if the objection is not made in the defendant's first responsive pleading; it is only the absence of an indispensable party which may (possibly) be raised later." *Id.* at 1262. The court in North Dixie Theatre, Inc. v. McCullion, 613 F. Supp. 1339 (S.D. Ohio 1985), claimed, "Although Rule 12(h)(2) preserves an *indispensable* party objection, this provision does not apply to persons who are merely necessary under Rule 19(a)." *Id.* at 1346 (emphasis in original).

122 Were we to put this argument in syllogistic form, it would be structured:

All defenses listed in Rule 12(h)(2) are preserved from waiver by failure to plead in the responsive pleading.
The objection of failure to join a necessary party is not listed in Rule 12(h)(2).

∴ The objection of failure to join a necessary party is not preserved from waiver by failure to plead in the responsive pleading.

If we let "A" stand for "all defenses listed in rule (12)(h)(2)," "B" for "preservation from waiver by failure to plead," and "C" for "the objection of failure to join an necessary party," the argument can be represented:

All A are B
No C are A
∴ No C are B

The conclusion here goes beyond that which is established by the premises. It makes an assertion about the totality of the class "B" (the "major term" of the syllogism). But the premises do not make any assertion about the totality of "B." Thus, this is an invalid syllogism. This is commonly called the "Fallacy of the Illicit Major." *See* I. Copi, Introduction to Logic 229 (6th ed. 1982).

123 One could argue that since Rule 12(h)(2) does not list it among the Rule 12(b) objections that are preserved, the implication is that it must be waived. This is countered by the fact that the objection is also not among the Rule 12(b) objections that are listed as waived in Rule 12(h)(1), which, by the same logic, would imply that it was preserved.

124 *See supra* text accompanying note 64.

125 *See* Phillips v. Baker, 121 F.2d 752 (9th Cir. 1941).

126 This is also true in those other jurisdictions which followed this line. *See supra* note 73.

127 Fed. R. Civ. P. 21 (emphasis added).

suggest that Rule 12 carefully limits when an objection to non-joinder may be made while Rule 21 allows the obverse, a motion to require joinder, to be made at any time, without restriction.

Finally, any analysis which classifies absent persons as necessary or indispensable prior to the Rule 19 analysis necessarily misinterprets Rule 19. Rule 19 contemplates a pragmatic analysis of the issue of compulsory joinder which does not result in a classification of parties until the Rule 19 analysis is complete.[128] It is inherently contradictory to say that the classification of a person (whether she is unnecessary, necessary, or indispensable) cannot be determined until the court completes the analysis, but the availability of the motion that brings about the analysis depends upon the classification of the person.

C. *Frustrating the Purpose of Rule 19: Disparate Treatment of Necessary and Indispensable Parties*

As is mentioned above, there is no reason to treat necessary and indispensable parties differently in terms of when the objection of failure to join may be raised.[129] The goals of Rule 19 apply equally to both necessary and indispensable parties.[130] Indeed, there may be absolutely no difference whatsoever between the position of an indispensable party and a necessary party in relation to the goals of requiring compulsory joinder.[131] Yet, because the difference between the Rule 12 references to Rule 19 parties prompts some courts to misinterpret Rule 19 and apply an artificial distinction, courts may treat these parties differently.[132]

For example, consider a suit to rescind a contract for the sale of government property to a private party. The plaintiffs sue the government agency that sold the property but do not join the private purchaser. Obviously, the outcome of the litigation will necessarily affect the private party's interests. Assume that these interests are such that a court would find him indispensable under Rule 19. If he is not subject to service, so that he cannot be joined in the action, Rule 12(h)(2) preserves the objection of failure to join and the court will be required to dismiss the action. If, however, he is subject to service and can be joined, certain courts may rule that the objection is waived if not pleaded in the time period pro-

128 *See supra* note 32.

129 *See supra* note 82.

130 The policies of avoiding prejudice to the absent party, multiple or inconsistent liability for the defendant, and inefficient use of judicial resources are just as strong when dealing with absent persons that may be joined as it is with absent persons that cannot be joined. *Id.*

131 This identity of interest can be demonstrated by a hypothetical: Suppose an owner of an undivided interest in land wishes to partition the land and brings a diversity action against one of two others who also have an undivided interest in the land. Suppose the absent owner is the citizen of another state and subject to service of process. In a circuit that holds the objection of failure to join a necessary party waived if not pleaded in or before the answer, the court would hold that the absent person is necessary, but that the objection has been waived if not pleaded in or before the answer. Now suppose the absent person moves into the same state as the plaintiff, so that joinder would destroy diversity. The absent person now meets all the criteria for an indispensable party and the defendant can bring a motion to dismiss for failure to join the person at any stage in the proceeding. This analysis applies equally to any absent party who is joinable at one stage but not joinable at a later stage of the action.

132 *See supra* notes 94-100 and accompanying text.

vided by Rule 12(h)(1).[133] In each case, the prejudice to the third party, the inefficiency of the adjudication, and the possibility of inconsistent claims against the defendant are the same. Yet the parties are treated differently.

Disparate treatment of necessary and indispensable parties actually thwarts achievement of the purposes of Rule 19. As the example above demonstrates, waiver of the objection of failure to join a necessary party prevents the courts from adjudicating the issue in a way that will prevent prejudice to the absent party, avoid additional litigation, and avoid imposing multiple or inconsistent liabilities upon the defendant.[134]

V. Resolving the Rule 19/Rule 12 Conflict

Some courts have interpreted the difference in wording between Rule 12(b) and Rule 12(h) in a way that inequitably treats like parties differently.[135] While the best solution to this inequity would be a technical amendment of Rule 12(h)(2), a practitioner can take certain steps to obtain equitable treatment for necessary parties immediately. A judicial interpretation of Rule 12 which is consistent with the goals of Rule 19 would also eliminate the problem.

A. *The Simple Solution: Amendment of Rule 12*

The simplest way to eliminate inequitable treatment of necessary and indispensable parties would be to amend Rule 12(h)(2) to comport with the 1966 amendment of Rules 19 and 12(b)(7). The pre-1966 term "indispensable" should be deleted, leaving the section to say "a defense of failure to join a party under Rule 19," as does Rule 12(b)(7).[136] The amended Rule 12(h)(2) would read

> (2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.

This would clarify the status of the Rule 19(a) objection and protect the interests underlying Rule 19 by assuring that all parties who have similar interests in an action would be treated alike.[137]

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133 *Id.*

134 Rule 21, however, gives the court the power to accomplish the very same joinder. *See infra* note 142 and accompanying text.

135 *See supra* notes 94-100, 129-34 and accompanying text.

136 *See supra* note 19.

137 There is a potential problem with this amendment in regards to the court's discretion in ordering joinder of parties who meet the Rule 19(a) criteria and for whom joinder is feasible. The current Rule 19(a) might be interpreted as requiring the court to order joinder. *See supra* note 47 and accompanying text. This would allow a party to use the objection for dilatory purposes. While the advisory committee's note indicates the court should have discretion in this area, *supra* note 116, it is unclear whether the Rule itself grants such discretion.

While an extensive discussion of Rule 19 is beyond the scope of this Note, the problem might be solved by amending Rule 19 to specify that feasibility of joinder is simply one criterion the court may use in determining the best course of action and clarify that the decision to order joinder of a necessary party, as well as whether to order dismissal because of an indispensable party, is within the discretion of the court. This could be accomplished by making three changes. First, changing the

B. *Practitioner Safeguards*

Practitioners also can take steps to alleviate the unfair treatment of persons who are "merely necessary." The most obvious, of course, is to be sure to bring any objection for failure to join a party in the Rule 12(b) motion, if one is made, or in the answer. Even if a Rule 12(b) motion has been made, the objection should be available in the answer in those jurisdictions which so held under the pre-1966 rule.[138] The defendant's briefs in support of the motion, however, will have to carefully explain that 12(h) does not control this particular objection.[139]

Practitioners might also avoid the problem by characterizing all Rule 19 motions as motions to join an indispensable party.[140] If the motion argues that the party is indispensable, it is not waived. This should cause the court to begin the Rule 19 analysis. If the court finds the party is necessary but joinable, Rule 19 states that the party "shall be joined."[141] If the court sees through this stratagem, however, and holds that the party cannot be indispensable because the party is joinable, it may dismiss the motion without considering the Rule 19 issues.

Additionally, practitioners can avoid the necessary/indispensable party dichotomy altogether by bringing a motion to order joinder under Rule 21.[142] While Rule 21 does not require a court to apply the Rule 19 analysis, that analysis would seem the most likely to be used to determine whether joinder is on "terms as are just."[143] Rule 21 specifically states

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imperative "shall" in the first and second sentences of Rule 19(a) to a permissive "may." Second, changing the first sentence of Rule 19(b) to make the Rule 19(b) criteria applicable to the decision of whether to order joinder of a necessary party as well as the decision of whether to order dismissal because of the unavailability of an indispensable party. Third, removing the references to feasibility of joinder in the opening sentences of Rules 19(a) and 19(b) and listing feasibility of joinder as an additional criterion under Rule 19(b).

Such an amendment would clarify the amount of discretion the court has in regards to all actions pursuant to Rule 19. It would also eliminate the confusion over whether feasibility of joinder is a substantive criterion for indispensability. Moreover, it would further focus the courts' consideration of the compulsory joinder issue on the practical effects of proceeding without the absent party, ordering joinder, or dismissing the case.

138 *See supra* note 73 and accompanying text.

139 The court may very well interpret Rule 12 as barring such a motion. The plaintiff is almost certain to cite the cases discussed *supra* in the text accompanying notes 94-100. The defendant will have to explain to the court that Rule 12 is actually silent on the treatment of necessary parties in this context, *see supra* text accompanying notes 64-65, and show that the objection should be preserved. *See supra* text accompanying notes 120-28.

140 At least one court, in State Farm Mut. Auto. Ins. Co. v. Mid-Continent Casualty Co., 518 F.2d 292 (9th Cir. 1975), referred to the characterization of the absent persons as "necessary" in the appellant's brief as affecting its decision.

This is solely a matter of characterization. The moving party simply moves for dismissal for failure to join an indispensable party under Rule 19, a motion preserved by Rule 12(h)(2). Alternatively, the party requests the court to order joinder, should the court determine the party is necessary rather than indispensable (note that Rule 19(a) is worded in the imperative, "a person who [is necessary] shall be joined as a party to the action," FED. R. CIV. P. 19(a)). The moving party would expect to lose the motion to dismiss, hoping to obtain the alternative remedy.

141 FED. R. CIV. P. 19(a).

142 Rule 21 provides: "Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just." FED. R. CIV. P. 21.

143 *Id.* Rule 21 provides for joinder "on such terms as are just." FED. R. CIV. P. 21. Rule 19 is designed to secure joinder of a party when "justice requires that the action should not proceed in his absence." FED. R. CIV. P. 19 advisory committee's notes (1966). Since justice is the determining criterion in each case, the factors defined in Rule 19, *see supra* note 19, should also apply to Rule 21.

that the motion is appropriate "at any stage of the action."[144] The Rule 21 motion will have the same effect as the objection for failure to join a party under Rule 19.[145] If the party is not joined, the defendant can move for dismissal under Rule 41(b) on the grounds that the plaintiff has failed to comply with a court order.[146]

C. *An Alternative Judicial Interpretation*

Finally, the courts can eliminate the problem by interpreting Rule 12 as preserving an objection for failure to join *any* party under Rule 19. There are several bases for such an interpretation.

The first is simply that Rule 12 is silent on whether the objection of failure to join a necessary party is waived or preserved when not pleaded in the first responsive pleading.[147] The courts may, therefore, determine the status of this objection. The Rules, however, have indicated a strong policy of protecting the motion for failure to join a party under Rule 19 from waiver. The fact that Rule 12(h)(2) specifically preserves the objection for failure to join an indispensable party demonstrates this. While, as noted above,[148] there may be absolutely no difference between the interests of necessary and indispensable parties in reference to the issue of compulsory joinder, the objection of failure to join an indispensable party may result in dismissal of the case, while the objection of failure to join a necessary party results in compulsory joinder of the party. Since the Rules specify that the objection should be preserved in a case where the greater difficulties caused by dismissal may be imposed on the litigants, the better interpretation is that the objection should also be preserved when the difficulties are less.

Second, Rule 19 was intended to abolish any "formalistic distinction between 'necessary' and 'indispensable' parties,"[149] and eliminates any distinction between parties prior to the conclusion of the Rule 19 analysis.[150] Since the status of absent persons as necessary or indispensable cannot be determined prior to the Rule 19 analysis, Rule 12(h)(2) must be interpreted to preserve the objection of failure to join *any* person under Rule 19 from waiver by failure to plead in the first responsive pleading.[151]

144 FED. R. CIV. P. 21, *supra* note 81.

145 When joinder is necessary and feasible, Rule 19(a) provides that the party "shall be joined." FED. R. CIV. P. 19(a). Thus, the objection for failure to join has the same effect as a motion to order joinder.

146 Rule 41 states: "For failure of the plaintiff . . . to comply with . . . any order of court, a defendant may move for dismissal of an action or any claim against defendant." FED. R. CIV. P. 41(b).

147 *See supra* notes 64-65 and accompanying text.

148 *See supra* text accompanying notes 129-34.

149 Arkwright-Boston Mfrs. Mut. Ins. Co. v. City of New York, 762 F.2d 205 (11th Cir. 1985).

150 *See supra* note 32.

151 An alternative analysis is to note that a party may only be "regarded as indispensable," FED. R. CIV. P. 19 advisory committee's note (1966), as a conclusion based on the Rule 19(b) analysis. The Rule 19(b) analysis is preceded by, and necessarily includes, a Rule 19(a) analysis of whether the party is necessary. Since the analysis of indispensability includes the issue of necessity, an objection based on indispensability necessarily includes an objection based on necessity. *Ergo*, the preservation of the objection for failure to join an indispensable party necessarily includes preservation of the objection for failure to join a necessary party.

Finally, preservation of the objection of failure to join any party under Rule 19 may also be based on Rule 12 itself. Rule 12(h)(2) preserves the objection of "failure to join a party indispensable under Rule 19."[152] But there is no such objection in Rule 12. The objection is for "failure to join a party under Rule 19."[153] Thus, Rule 12(h)(2) seems to preserve an objection which does not exist, and the objection listed in Rule 12(b)(7) seems to fall outside the purview of Rule 12(h).[154] The best way to reconcile Rule 12(h)(2) with Rule 12(b)(7) is to hold the term "indispensable" to be superfluous. Rule 12(h)(2) would, therefore, preserve the objection of failure to join any party under Rule 19.

Each of these interpretations of the Rules provides a logical basis upon which to hold that the objection for failure to join a necessary party is not waived by failure to plead in the first responsive pleading. Such an interpretation properly applies the analysis specified by Rule 19, protects the purposes underlying the doctrine of compulsory joinder, and eliminates the inequity of treating like parties differently.[155]

VI. Conclusion

Similar treatment of similar parties is one of the basic goals of the American judicial system. Because of an oversight in the 1966 amendment of Rule 12(h), however, similarly situated parties are sometimes treated differently. Some circuit courts have ruled that courts can ignore the interests of a necessary party who may have the exact same relationship to an action as an indispensable party. Moreover, this inequitable treatment has occurred in circumstances where the court would be required to protect the indispensable party's interest, even to the point of dismissing the case.

A variation in the wording of Rule 12, which leads to misinterpretation of Rule 19, produces this differentiation. A judicial interpretation of Rule 19 in accord with the purposes of Rule 19 would more effectively achieve the Rule's goals of judicial economy and equitable treatment. Practitioners may, to a certain degree, accomplish the same goals by artful characterization of their motions. The most effective solution to the inequitable treatment of necessary and indispensable parties, however, is an amendment of Rule 12(h)(2) to eliminate the differentiating wording. Such an amendment would guide the courts back to "equity and good conscience" in dealing with necessary but joinable absent persons.

W. Casey Walls

152 FED. R. CIV. P. 12(h)(2).

153 FED. R. CIV. P. 12(b)(7).

154 If the court finds a distinct objection of failure to join an indispensable party exists, there must, likewise, be a distinct objection of failure to join a necessary party. Since Rule 12(h) ignores this objection, *see supra* notes 64-65 and accompanying text, the court must confront the issue of the status of this later objection after the responsive pleading. Since the goals served by preserving either objection are identical, *see supra* notes 129-34, the better interpretation is that the objection of failure to join a necessary party should be preserved.

155 Once these interpretations are applied, an issue arises concerning the court's discretion when ruling on an objection for failure to join a necessary party. *See supra* note 137.